35494

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
SUPREME COURT NO: 091901

Clayton Brown, as guardian for and on behalf of Clarence Brown — **PLAINTIFF / APPELLANT**

v.

Genesis Healthcare Corporation; Genesis Healthcare Holding Company II, Inc.; Genesis Health Ventures, Inc. of West Virginia; Genesis Eldercare Corporation; Genesis Eldercare Network Services, Inc.; Genesis Eldercare Management Services, Inc.; Genesis Eldercare Rehabilitation Services, Inc.; Genesis Eldercare Staffing Services, Inc.; Genesis Eldercare Hospitality Services, Inc.; Marmet SNF Operations, LLC; 1 Sutphin Drive Associates, LLC; 1 Sutphin Drive Operations, LLC; Genesis WV Holdings, LLC; Glenmark Associates, Inc.; Marmet Health Care Center, Inc. n/k/a MHCC, Inc., Canoe Hollow Properties, LLC; Robin Sutphin and Shawn Eddy;

DEFENDANTS / APPELLEES

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

REPLY BRIEF OF APPELLANT

ORAL PRESENTATION REQUESTED

McHUGH FULLER LAW GROUP, PLLC
James B. McHugh, WV Bar No. 10350
Michael J. Fuller, Jr., WV Bar No. 10150
D. Bryant Chaffin, WV Bar No. 11069
97 Elias Whiddon Rd.
Hattiesburg, MS 39402
Telephone: 601-261-2220
Facsimile: 601-261-2481
Attorneys for Plaintiff/Appellant

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APPELLANT'S REPLY TO THE RESPONSE OF APPELLEES MARMET HEALTH CARE CENTER, INC.; CANOE HOLLOW PROPERTIES, LLC, AND ROBIN SUTPHIN

Plaintiff/Appellant (hereinafter "Plaintiff"), by and through the undersigned attorneys, offers the following succinct response to Appellees Marmet Health Care Center, Inc.; Canoe Hollow Properties, LLC, and Robin Sutphin's (hereinafter "Defendants'") Responsive Brief in this matter. The defendants' assertion of arbitration rights cannot arise through misplaced contractual characterization of a postscript "admission agreement" in the absence of fundamental contract elements. For that reason, along with Clarence and Clayton's clear West Virginia statutory right to commence their action in the courts, Defendants' subsequent unambiguous waver of any purported arbitration enforcement, Defendants' misstatement of "relevant facts" in their Responsive Brief, and the other reasons set forth herein and in Plaintiff's Opening Brief, as well as those set forth in the brief *Amicus Curiae,* Plaintiff submits that the instant appeal is well taken. In support thereof, Plaintiff states as follows:

I. Defendants "Relevant Facts" are, at least in part, erroneous.

Defendants' brief attempts to state the "relevant facts" of this matter. In doing so, Defendants recite numerous "facts" that are in no way relevant to the matter presently before the Court, nor have many of these "facts" ever been previously discussed or provided as evidence before either this Court or the Circuit Court. For example, on page 2 of Defendants' Brief, there is a discussion of the history of Marmet Health Care Center and its founders that bears no impact whatsoever on the matters at bar. *See* Defendants' Brief at p. 2.

Further, Defendants' characterization of the written lease between Marmet and Canoe Hollow Properties, LLC, also mischaracterizes that document. *Id.* In fact, the

lease does **not** "provide that the relationship of the parties is solely landlord and tenant." *Id.* The lease plainly does not state at any point that Canoe Hollow did not have any involvement or could not be involved with the operations of the facility. Instead, the lease provided that Canoe Hollow would have full access to Marmet's financial information, clear indication that Canoe Hollow, at least potentially, played a more involved role than just a leasor with no operation role or interest in the facility as Defendants' suggest.

Even more specious is Defendants' attempt in the first full paragraph on page 3 of their brief to characterize the "Admission Agreement" at issue in this matter as a routine occurrence when Mr. Brown was returning to the facility or being "re-admitted" from a hospital. In fact, as Plaintiff pointed out to the Defendants in his pleadings before the Circuit Court, Clarence Brown was initially admitted to Defendants' facility nearly eight years prior on April 27, 1996, and he resided at Defendants' facility, without interruption, from October 10, 2003, through the date the "Admission Agreement" at issue was apparently signed on March 26, 2004. Simply stated, there was no hospital admission or any other "re-admission" to Marmet that could even potentially provide a reason or basis for the document at issue. Defendants cannot show that Mr. Brown was afforded any valuable consideration for the document, as he was already a resident of Defendants' facility and, unlike Defendants, gained nothing from its terms. Defendants' brief does, however, admit that the Defendants sought a benefit from the Arbitration Agreement. *See* Defendants' Brief at p. 3. Notably, Marmet's history with other lawsuits or arbitrations is also irrelevant, as such character evidence does not prove or disprove Plaintiff's claims in this matter. Additionally, there is no proof that arbitration is actually "less costly, quicker, or less adversarial" than an action in Court.

II. Defendants' arguments are without merit.

A. The "Admissions Agreement" is not valid and enforceable.

As Defendants misstated in their "Relevant Facts", Defendants again attempt to characterize the March 2004 "Admission Agreement" as a routine occurrence during Mr. Brown's residency, despite a total lack of evidence to the effect. There was no "admission" for an "Admission Agreement". Instead, Defendants wanting something from Mr. Brown, yet nothing was provided to him in return. He was already receiving care, and payments were already being made to Defendants for said care. Mr. Brown could not "agree to pay for Marmet's services for additional consideration" when that agreement had already been given many years prior and had, at a minimum, been unimpeded since October of the prior year. An unambiguous written contract may be modified or superseded by a subsequent contract only if based on valuable consideration. *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.,* 161 W.Va. 603, 606, 245 S.E.2d 157 (W.Va. 1978) (citations omitted). Lacking consideration for the purported agreement, there can be no valid contract.

It is well-settled under West Virginia law that the fundamental elements of a valid contract are (1) competent parties, (2) legal subject-matter, (3) valuable consideration, and (4) mutual assent. *Ways v. Imation Enterprises Corp.,* 214 W.Va. 305, 589 S.E.2d 36 (W.Va. 2003) (citing *Virginian Export Coal Co. v. Rowland Land Co.,* 100 W.Va. 559, 131 S.E. 253 (1926). "There can be no contract, if there is one of these essential elements upon which the minds of the parties are not in agreement." *Id.* Defendants have failed to establish that a valid agreement to arbitrate exists in this matter.

Defendants again incorrectly assert that the arbitration provision required both parties to waive their rights to court and arbitrate any claims between them. This is

untrue, as the agreement plainly reserves Defendants right of access to the courts, while requiring Plaintiff to arbitrate any claims he might have. *See* Arbitration Agreement at issue, attached to Plaintiff's Opening Brief as Exhibit C. Defendants argue that they may want to stop caring for a resident that is not delinquent or may disagree with a course of treatment and that they would be limited to arbitration in these situations. However, the agreement preserves a right to the courts to defend any decision to discharge a resident. *Id.* Further, the fact of the matter remains, however, that Defendants would be able to pursue a delinquent resident in court to collect monies due and certainly preserved that right for themselves. Residents like Mr. Brown and their families, however, have no choice but to submit their claims to arbitration.

Defendants cite this Court to a Federal District Court case, *Miller v. Equifirst Corp. of WV,* 2006 WL 2571634 (S.D.W.Va. 2006), for the proposition that one party may retain its rights to the courts while the other party is forced to arbitrate. In *Miller*, however, the only right to the courts that was retained was in regard to foreclosure and bankruptcy, and the District Court noted that these limitations were"not only common in arbitration agreements of this kind but quite necessary in order to effectuate foreclosure and a retaking of the subject property by lawful process, where needed, without breach of the peace." *Id.* at *11. The District Court further distinguished this Court's decision in *Arnold v. United Companies Lending Corp.,* 511 S.E.2d 854 (W.Va.1998) by stating that unlike *Arnold*, the plaintiff in *Miller* approached the defendants seeking a loan rather than being solicited, among other reasons. *Id.* at *10.

Plaintiff submits that the position of the Browns in this matter is much closer to the plaintiff in *Arnold* than the plaintiff in *Miller*. Although educated unlike the plaintiffs in *Arnold*, Mr. Brown was already a resident of Defendants' facility and did not seek a new

agreement. Instead, the Defendants came to the Browns in a superior position and had a new "Admission Agreement" executed, despite their being no need for such an agreement other than for their benefit. This provision violates West Virginia law.

B. West Virginia Code § 16-5C-15(c) does prohibit an agreement to arbitrate.

Contrary to Defendants' assertions, West Virginia Code § 16-5C-15(c) does prohibit the agreement to arbitrate in this matter. Defendants assert that the stattue does not govern the forum for the "action" described in the statute. Further, while Defendants admit that some of the relief available under the code section requires a court proceeding, Defendants argue that the Plaintiff is not seeking such relief and is therefore not entitled to a court proceeding under the statute. This argument is without merit. Clearly the code provides that a resident may bring an action for compensatory damages sufficient to compensate the resident for injuries, and punitive damages where the deprivation of any right or benefit is found to have been willful or in reckless disregard of the lawful rights of the resident. *Id.* Additionally, "a resident may also maintain an action pursuant to this section for any other type of relief, including **injunctive and declaratory relief**, permitted by law." *Id.*, emphasis added.

Plaintiff submits that because such relief can only be provided by a court, the arbitration provision, along with any other limitation of the rights under § 16-5C-15, can not be enforced. As previously stated in Plaintiff's brief, Rule 3 of the West Virginia Rules of Civil Procedure states that "a **civil action** is commenced by filing a complaint **with the court.**" W. Va. R. Civ. P. 3(a), emphasis added. Further, an examination of W. Va. Code § 16-5C finds repeated references to actions being brought in Circuit Courts. *See* W. Va. Code § 16-5C-1 et seq. Most importantly, some of the relief

provided for in § 16-5C-15(c), including injunctive and declaratory relief, can **only** be awarded by a Circuit Court. *See generally* W. Va. Code § 53-5-1 et seq; W. Va. Code § 53-5-1 ("Every judge of a circuit court shall have general jurisdiction in awarding injunctions, whether the judgment or proceeding enjoined be in or out of his circuit, or the party against whose proceeding the injunction be asked reside in or out of the same.") Thus, W. Va. Code § 16-5C-15(c) clearly precludes a contracted change of forum or other waiver that would limit a Plaintiff's right to commence an action in a court of law.

Plaintiff notes that on April 15, 2010, the Illinois Supreme Court reversed *Carter v. SSC Odin Operating Co., LLC*, 885 N.E.2d 1204 (Ill. Ct. App. 2008); *appeal denied Carter v. SSC Odin Operating Co., LLC*, 897 N.E.2d 250 (Ill. 2008); *cert. denied SSC Odin Operating Co., LLC v. Carter*, 129 S.Ct. 2734 (U.S. 2009), cited by Plaintiff in his Opening Brief. *See Carter v. SSC Odin Operating Co.*, 2010 WL 1493626 (Ill. Apr 15, 2010). Plaintiff submits that in doing so, the Illinois Supreme Court incorrectly found a conflict between the state law and federal law with over-reaching logic remarkably similar to its incorrect analysis regarding "implied field preemption" in *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 197 Ill.2d 112, 757 N.E.2d 75 (Ill. 2001). The Illinois Supreme Court repeatedly cites their *Sprietsma* decision without mention of the fact that it was subsequently reversed by the United States Supreme Court for this very issue in *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 123 S.Ct. 518 (2002).

W. Va. Code § 16-5C-1 does not specifically target arbitration agreements but instead prohibits "any waiver" of the "right to commence an action." *See* W. Va. Code § 16-5C-15(c). Citing *Southland Corporation v. Keating*, 465 U.S. 1, 11, 16, 104 S.Ct.

852, 79 L.Ed.2d 1 (1984) and *Perry v. Thomas,* 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), this Court has recently recognized that the Federal Arbitration Act preempts state law that would directly invalidate or undercut the enforceability of arbitration agreements specifically. *State ex rel. Clites v. Clawges*, 685 S.E.2d 693 (W.Va. 2009). This is simply not the case here.

C. Defendants waived the right to compel arbitration.

Defendants do not address the fact that they did not initially answer Plaintiff's Complaint and that Plaintiff filed an application for default against them. Thus, Defendants have done nothing to rebut the argument set forth by the Plaintiff and supported in his opening brief and supported by this Court's decision in *State ex rel. the Barden and Robeson Corp. v. Hill*, 539 S.E.2d 106 (W Va. 2000). Defendants substantially utilized the litigation machinery, obtaining the dismissal of Canoe Hollow Properties by the Circuit Court and conducting depositions without moving for arbitration or seeking a hearing on said motion by the Circuit Court. Defendants responded to discovery propounded by Plaintiff and, in turn, propounded their own discovery requests upon Plaintiff. These acts are wholly inconsistent with Defendants' position and the Circuit Court's ruling that arbitration is the proper forum for this matter. Further, these acts prejudiced Plaintiff in causing delays and expense.

D. Defendant Canoe Hollow was not properly dismissed.

Defendants incorrectly assert that Canoe Hollow was properly dismissed based upon a lease agreement. Defendants again attempt to insert "findings" of the Circuit Court that were not stated by the Court at the hearing or in the Court's Order granting Defendants' motion. The lease was wholly insufficient, as it did not state that Canoe Hollow did not have any involvement or could not be involved with the operations of the

facility. Further, as Plaintiff's counsel argued before the Circuit Court, the lease also provided Canoe Hollow with full access to the lessee's financial information, an indication that Canoe Hollow, at least potentially, played a more involved role than a leasor that is not involved in the operation of the facility. Thus, the lease did not operate in the same manner as an affidavit or other evidence that unequivocally provided evidence of Canoe Hollow's involvement, or lack thereof, with the operation of the facility.

The Circuit Court in this matter failed to follow the appropriate standards in West Virginia for either motions to dismiss or for summary judgment as set forth in Plaintiff's opening brief. Thus, the Circuit Court in this matter erred in granting Canoe Hollow's Motion to Dismiss and should be reversed.

CONCLUSION

Wherefore, for the reasons set forth herein and in Plaintiff's opening brief, Plaintiff respectfully submits that the appeal of the Orders of the Circuit Court of Kanawha County in this matter is well taken, and requests that the Circuit Court's Orders be reversed and Plaintiff's cause reinstated against the Defendants in that forum.

Respectfully submitted, this the 24th day of May, 2010,

Clayton Brown, as guardian for, and on
Behalf of, Clarence Brown

McHUGH FULLER LAW GROUP, PLLC

By: _____

James B. McHugh
West Virginia Bar Number 10350
Michael J. Fuller, Jr.
West Virginia Bar Number 10150
97 Elias Whiddon Rd.
D. Bryant Chaffin

West Virginia Bar Number 11069
Hattiesburg, MS 39402
Telephone: 601-261-2220
Facsimile: 601-261-2481
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 24th of May, 2010, I served the foregoing upon all counsel of record by facsimile (with exhibits) and by depositing true and correct copies in the U.S. Mail, postage prepaid, and addressed to:

Shawn P. George, Esq.
George & Lorensen, PLLC
1526 Kanawha Blvd. E
Charleston WV 25311

Counsel for Plaintiff/Appellant